MALAYSIAN REPORTS

Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-77 OF 1989
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
4 DECEMBER 1989

Contract — Breach of — Damages — Only party to contract entitled to claim for loss or damage caused by breach of contract — Contracts Act 1950, s 74(1)

In this case, the plaintiff had, by a letter dated 24 March 1976, entered into a contract with the defendant whereby the plaintiff agreed to sell and the defendant agreed to buy 270,105 shares in a company called Syarikat Kresen at the price of $45,000. The contract provided that in consideration of the plaintiff agreeing to sell the said shares in Syarikat Kresen to the defendant, the latter agreed and undertook to arrange for the plaintiff's title deed pledged or charged to the Bangkok Bank Ltd, Kuala Lumpur, to be released by the said bank on 31 August 1976, by payment to that bank of $125,755.41 plus interest up to the date of such payment. The plaintiff had performed all his obligations under the contract by the delivery of the following documents to the defendant, namely:

(a) all the certificates of the said shares together with the relevant transfer forms for them;
(b) a resolution approving the sale and transfer to the defendant of the said shares and the issue of new certificates; and
(c) an up-to-date list of creditors and debtors and all other liabilities of Syarikat Kresen certified as correct.

The defendant paid the plaintiff $45,000 and undertook to discharge the title deed, which was in respect of a piece of land held under lot 467, EMR 3680, mukim of Cheras ('the Cheras land').

Within three weeks of the conclusion of the contract with the defendant, the plaintiff, in an option letter dated 12 April 1976, offered to sell the Cheras land, concerning which the defendant had undertaken to secure the release of the title deed from the Bangkok Bank Ltd, Kuala Lumpur. The said letter of option was for a period of one month and the price offered was more than $280,000. By 31 August 1976, the defendant failed or neglected to obtain the release of the charge on the Cheras land.

Datin Peggy Taylor, the administratrix of the estate of Datuk Eric Taylor who passed away in England on 8 August 1977, in an affidavit affirmed on 10 October 1980, gave particulars of the damages suffered by the plaintiff as a result of the non-performance of the said contract dated 2 March 1976, in discharging the title of the plaintiff's land. She claimed ascertained damages of $181,000 and also general damages for loss of profits for inability to deal with the land and for embarrassment and suffering.

The damages were assessed by the senior assistant registrar of the High Court at $181,500. The defendant/appellant appealed but the appeal was dismissed by the judge of the High Court [see [1989] 2 MLJ 436]. The appellant appealed to the Supreme Court.

Held, allowing the defendant's appeal:

(1) Only a party to a contract or his estate is entitled to compensation for loss or damage caused by the breach of contract under s 74(1) of the Contracts Act 1950. In this case Datin Peggy Taylor, as administratrix of the estate of her deceased husband, could prove and obtain compensation for any loss suffered by the deceased or his estate but not for loss suffered by her in her personal capacity.

(2) The loss of the sum of $100,000 suffered as a result of the forced sale of the Kenny Hill house was a loss to Datin Peggy Taylor in her personal capacity and was not a loss caused to the deceased or his estate as a result of the breach of contract by the appellant.

(3) There was no evidence to show that efforts were made by the administratrix to sell the Cheras land or that she was unable to sell it because of the failure on the part of the appellant to discharge the land.

(4) It was admitted by Datin Peggy Taylor that she did not make any effort to rent out the Cheras land and therefore no damage or loss from rental of the land had been proved.

(5) The loss of rental payments by Datin Peggy Taylor for a flat was not a loss to the deceased's estate and therefore the deceased's estate was not entitled to claim them.

(6) As the award of damages as assessed by the senior assistant registrar and confirmed by the High Court did not come within the purview of s 74(1) of the Contracts Act 1950, the appeal should be allowed.

Cases referred to
1 *Hadley* v *Baxendale* (1854) 9 Ex 341 (refd)
2 *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528 (refd)
3 *Koufos* v *Czarnikow Ltd* [1969] 1 AC 350 (refd)
4 *Toeh Kee Keong* v *Tambun Mining Co Ltd* [1968] 1 MLJ 39 (refd)

Legislation referred to
Contracts Act 1950 s 74

Appeal from: Civil Suit No 433 of 1977 (High Court, Kuala Lumpur)

V Pradhan for the appellant.
C Abraham (*RS Nathan* with him) for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJJ (delivering the judgment of the court): This appeal was concerned with the assessment of damages by the senior assistant registrar of the High Court, who had on 28 July 1981, assessed and certified that the damages to which one Datuk Eric Taylor ('the plaintiff') was entitled amounted to $181,500. Lim Foo Yong & Sons Realty Sdn Bhd ('the defendant') appealed against the decision of the senior assistant registrar and the learned judge of the High Court at Kuala Lumpur, after referring to *Hadley* v *Baxendale*;[1] *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*;[2] and *Koufos* v *Czarnikow Ltd*[3] and having directed himself on the law that should be applied in this case, however, dismissed that appeal on 4 February 1989 [see [1989] 2 MLJ 436].

The defendant was dissatisfied with the decision of the High Court and appealed to the Supreme Court on 3 March 1989.

Briefly the facts of the case were that the plaintiff had, by a letter dated 24 March 1976, entered into a contract with the defendant whereby the plaintiff agreed to sell and the defendant agreed to buy 270,105 shares in a company called Syarikat Kresen at the price of $45,000. The contract provided that in consideration of the plaintiff agreeing to sell the said shares in Syarikat Kresen to the defendant, the latter agreed and undertook to arrange for the plaintiff's title deed pledged or charged to the Bangkok Bank Ltd, Kuala Lumpur, to be released by the said bank on 31 August 1976, by payment to that bank of $125,755.41 plus interest up to the date of such payment. The plaintiff had performed all his obligations under the contract by the delivery of the following documents to the defendant, namely:

(a) all the certificates of the said shares together with the relevant transfer forms for them;
(b) a resolution approving the sale and transfer to the defendant of the said shares and the issue of new certificates; and
(c) an up-to-date list of creditors and debtors and all other liabilities of Syarikat Kresen certified as correct.

The defendant paid the plaintiff $45,000 and undertook to discharge the title deed, which was in respect of a piece of land held under lot 467, EMR 3680, mukim of Cheras ('the Cheras land').

Within three weeks of the conclusion of the contract with the defendant, the plaintiff in an option letter dated 12 April 1976, offered to sell the Cheras land, concerning which the defendant had undertaken to secure the release of the title deed from the Bangkok Bank Ltd, Kuala Lumpur. The said letter of option was for a period of one month and the price offered was more than $280,000. By 31 August 1976, the defendant failed or neglected to obtain the release of the charge on the Cheras land.

Datin Peggy Taylor, the administratrix of the estate of Datuk Eric Taylor who passed away in England on 8 August 1977, in an affidavit affirmed on 10 October 1980, gave the following particulars of the damages suffered by the plaintiff as a result of the non-performance of the said contract dated 24 March 1976, in discharging the title of the plaintiff's land:

> Ascertained damages of $181,000 — the particulars of which are as follows:
>
> (a) The loss of the sum of $100,000 being loss suffered as a result of the forced sale of the plaintiff's matrimonial house at Kenny Hill.
>
> 1) The said land was the only transactionable asset owned by the plaintiff other than the matrimonial house in Kenny Hill and he had intended to sell the same to overcome financial difficulties experienced by his firm brought on by tardy payments of professional fees by clients, eg the defendant themselves have at this moment five (5) cases outstanding with the plaintiff for non-payment of professional fees outstanding. A copy of the said intention of sale vide option letter dated 12 April 1976 I annex herewith and mark 'DPT-1'.
>
> 2) The failure of the defendant to complete the said agreement by discharging the said land compelled the plaintiff to sell our matrimonial house in Kenny Hill as a last resort.
>
> 3) Consequently the sale of our house was sold at a loss because it was not a very good time to sell residential properties at that material time and the plaintiff was compelled to accept a lesser price in order to make a quick sale as funds were urgently required, the particulars of which are as follows:
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> i) The conservative market value at the material time of sale is $400,000
> (A copy of the valuation report is annexed herewith and marked 'DPT-2'.)
>
> ii) Forced sale of house in February 1977 $300,000
> (A copy of the sale and purchase agreement dated 2 February 1977 is annexed herewith and marked 'DPT-3'.)
>
> Loss $100,000.00
>
> (b) Loss of $44,000 being rental payments from 15 February 1977 to 15 October 1980 and still continuing at the rate of $1,000 per month. Two (2) copies of the tenancy agreements dated 27 July 1977 and 5 June 1979 respectively are annexed herewith and marked 'DPT-4' and 'DPT-5'.
>
> (c) Loss of income from rental from the said land amounting to $37,500 in its present agricultural state. A copy of the valuation report is annexed herewith and marked exh 'DPT-6'.

She also claimed general damages for loss of profits for inability to deal with the land and for embarrassment and suffering.

During the appeal before us, Mr V Pradhan, counsel for the appellant, referred to the following s 74(1) of the Contracts Act 1950 (Rev 1974):

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

He further referred to the following illustration (n) to that section:

> A contract to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined. A is not liable to make good to B anything

except the principal sum he contracted to pay, together with interest up to the day of payment.

He then referred to *Toeh Kee Keong* v *Tambun Mining Co Ltd*[4] and pointed out that the Federal Court had stated in that case, at p 40, that s 74(1) of the Contracts Act 1950 was the statutory enunciation of the rule in *Hadley* v *Baxendale*[1] which laid down the main principles as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Counsel submitted that damages in this case could only relate to any loss on the sale of the Cheras land. He then stated that the loss must also be suffered by one of the parties himself or his estate and pointed out that Datin Peggy Taylor was not a party to the said contract and that the Kenny Hill house belonged to her and not to her deceased husband as evidenced by the memorandum of transfer (exh 'P2') which was signed by her and shown on pp 15-18 of the supplementary appeal record.

Mr Pradhan then referred to the option dated 12 April 1976, at p 147 of the appeal record and pointed out that it had contemplated the sale of the Cheras land as charged land. He stated that there was no evidence adduced for the plaintiff to show that the Cheras land could not be sold because it was charged land and submitted that the claim for damages had not been proved. As regards the claim for loss of income from rental payments for the Cheras land, Mr Pradhan referred to the evidence of Datin Peggy Taylor on p 12 of the supplementary appeal record where she had admitted to the senior assistant registrar that she did not make any attempt to rent out the Cheras land. Counsel therefore submitted that damages had not been proved regarding the alleged loss of income of $37, 500 in respect of the Cheras land.

Mr Cecil Abraham, who appeared for the plaintiff in the appeal before us pointed out that there were only three heads of damages in this case. He stated that the learned judge had directed himself correctly on the law applicable for the assessment of damages in this case and he also conceded that charged land could be sold. But he pointed out that the plaintiff was in financial difficulties because he was unable to dispose of the Cheras land which the defendant had failed to discharge as required under the contract of 24 March 1976. Datin Peggy Taylor was compelled to sell the matrimonial home in Kenny Hill because of the immense financial worries and difficulties brought upon the plaintiff by reason of the defendant's failure to comply with the agreement of 24 March 1976. Counsel added that the damages suffered were by reason of the defendant's failure to comply with the terms of the said agreement.

We were of the view that the first issue to be considered was who were the parties to the contract of 24 March 1976 because only a party to the contract or his estate is entitled to compensation for loss or damage caused by a breach of the contract under s 74(1) of the Contracts Act 1950. In our judgment the word 'party' in the said section can only mean a party who was a signatory to the contract or his estate. In this case Datin Peggy Taylor, as administratrix of the estate of her deceased husband, could prove and obtain compensation for any loss suffered by the deceased or his estate but not for any loss suffered by her in her personal capacity.

Although the Kenny Hill house was the registered property of Datin Peggy Taylor and not that of her deceased husband, it must also be noted that the real reason for the sale of the Kenny Hill house, as admitted by her, was due to the financial difficulties experienced by the deceased's firm because of tardy payment of professional fees by clients. Therefore, apart from the fact that the loss of the sum of $100,000 suffered as a result of the forced sale of the Kenny Hill house was a loss to Datin Peggy Taylor in her personal capacity, it was not a loss caused to the deceased or his estate as a result of the breach of the said contract by the defendant.

The next issue was that concerning the Cheras land. There could be no doubt and it was rightly conceded that the Cheras land, although charged, could be sold if efforts had been made to sell it. The only evidence that effort was made to sell the Cheras land was the option dated 12 April 1976 signed by Datuk Eric Taylor before his death and it was an option granted for the sale of the Cheras land even before the title deed charged to the Bangkok Bank Ltd was released. There was no other evidence to show that efforts were made by the administratrix to sell that piece of land or that she was unable to sell it because of the failure on the part of the defendant to discharge the land.

As regards the loss of income from rental of the Cheras land amounting to $37,500, it has been pointed out by counsel for the defendant that Datin Peggy Taylor had admitted in her evidence before the senior assistant registrar that she did not make any attempt to rent out that piece of land. As such, we agreed with counsel for the defendant that no damage or loss in this respect had been proved and that the plaintiff was not entitled to the award of the said $37, 500.

Finally, we must point out that the loss of $44,000, being rental payments by Datin Peggy Taylor for a flat from 15 February 1977 to 15 October 1980, was not a loss to the deceased's estate. As such the plaintiff's estate was not entitled to the award of $44,000. As the award of damages, as assessed by the senior assistant registrar and

confirmed by the High Court, did not come within the purview of s 74(1) of the Contracts Act 1950, we therefore allowed the appeal but only with costs incurred in this court. We also ordered that the deposit be refunded to the appellant.

Appeal allowed.

Solicitors: *Skrine & Co; Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 05-51-89 AND 05-53-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
25 NOVEMBER 1989

Preventive Detention — Habeas corpus — Detention under Dangerous Drugs (Special Prevention Measures) Act 1985 — Detention stated in order to take effect from date after date of order — Validity of detention — Dangerous Drugs (Special Preventive Measures) Act 1985, s 6(1) — Federal Constitution art 5(1)

Statutory Interpretation — Change in words of enactment — Intention to change meaning

In these cases, the appellants had been detained under orders made pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. The orders signed by the Deputy Minister were dated and signed on 8 January 1987 but it was expressly stated in the body of the orders that the detention was to take effect from 11 January 1987 in each case. Section 6(1) of the Act gave power to the Minister to make a detention order to direct that a person be detained for a period not exceeding two years from the date of such order. The appellants had applied for habeas corpus but these were refused in the High Court. The appellants appealed.

Held, allowing the appeals:
It is not permissible under s 6(1) of the Act for the Minister to specify a different date from the date of the order for the commencement of the detention and the detention in these cases were therefore invalid and habeas corpus should issue.

Cases referred to
1 *R* v *Buttle* [1870] LR1 CCR 248 (refd)
2 *Andrew s/o Thamboosamy* v *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156 (refd)
3 *PP* v *Koh Yoke Koon* [1988] 2 MLJ 301 (refd)

Legislation referred to
Dangerous Drugs (Special Preventive Measures) Act 1985 s 6
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)
Federal Constitution art 5(1)
Internal Security Act 1960 s 8(1)

Karpal Singh for the appellants.
Balia Yusof bin Haji Wahi (Deputy Public Prosecutor) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): These two appeals were considered together because in both cases the appellants, Tan Hoon Seng and Ng King Chew, by separate notices of motion, sought from the High Court writs of habeas corpus for their release from detention based on the same ground which also became a common ground in the appeals.

Both the appellants were detained separately pursuant to orders under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The respective orders were signed by the Deputy Minister for Home Affairs. The said orders of detention, although made separately, were dated on the same date, that is 8 January 1987.

As required by the Act the orders together with the grounds and allegations of fact were served on the appellants within the time prescribed.

Both the detention orders against the said Tan Soon Heng and Ng King Chew bore the words 'ditahan selama dua tahun mulai dari 11 Januari 1987 di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang' in the body of the order. See p 42 of the appeal record in respect of Tan Soon Heng and p 40 of the appeal record in respect of Ng King Chew.

Thus, although the detention orders were dated and signed on *8 January 1987*, it is expressly stated in the body of the orders that the detention was to take effect from *11 January 1987* in each case. [Emphasis added.]

The power of the Minister to make a detention order under the Act is conferred by s 6(1) of the Act. The power under s 6(1) of the Act is expressly stated in the following terms, that is to say that whenever the Minister after considering the report of investigation and the report of the inquiry officer is satisfied that a person has been or is associated with any activity relating to or involving the trafficking in of dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order 'direct that such person be detained for a period not exceeding two years *from the date of such order*'. [Emphasis added.]

The Act was passed by Parliament in 1985. Prior to the passing of the Act, there were similar statutory powers of preventive detention in existence, namely, the respective provisions in the Internal Security Act 1960 and the